United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7249

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

ANNA R. JOHNSON and ROBERT K. JOHNSON

Plaintiffs-Appellants

- against-

PHILLIP KNAPP

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The main issue in this case concerns the issue of informed consent for elective surgery where an opthomologist surgically removed bilateral cataracts from the eyes of a lady during the same hospital admission and this lady, a relatively young woman, and the mother of four very young children, lost her total vision permanently in both eyes following this surgery.

The other issue concerns the question of whether or not the Court committed plain error in its charge to the jury on the issue of informed consent, by failing to properly instruct the jury on this issue, even after the jury requested a clarification on this part of the instructions, after having deliberated for a long period, then the Court further instructed the jury and told them the doctor was under no legal obligation to inform the lady patient, before the surgery on both her eyes, about any of the risks involved, including the risk of going totally blind, which is exactly what happened to the lady in this case.

Does not this verdict for the defendant doctor, require reversal, in the interets of justice and sound public policy? Does not the verdict of the jury which was a special one by interrogatories, and which was returned by the jury together with a note which stated as follows,"Even we found Dr. Knapp not guilty of malpractice, as set down in the questions directed to the Jury by the Judge, we feel that according to given testimony, Dr. Knapp failed to establish a sound patient-doctor relationship."

Did not the jury in effect say that they found that the doctor never did inform the lady of the risks involved in this elective surgery, and that the doctor did not obtain informed consent from this lady before he operated on both her eyes, but they brought in a verdict for the doctor by having been made to answer the First Interrogatory with a"No" in answer to the question, "Did Dr. Knapp fail to use the skill and care of an ordinary opthalmologist at the time and place in question?(If the answer to Question 1 is "No," no further questions need be answered.)"

STATEMENT OF THE CASE

This is a civil diversity action for money damages by a lady against an opthomologist for becoming permanently blind after surgery performed by the doctor on both her eyes for the removal of bilateral cataracts.The surgery was performed in one hospitalization, and this was only the second time this doctor had performed bilateral cataract surgery on any patient,but the doctor did not inform the lady of this fact. The doctor also failed to inform her of any of the risks involved in such surgery and the only thing he told her was that there was better than 90% chance of success without listing specific causes of failure. (App. 321,322,8)

The doctor never told her she could become blind, and since this was elective surgery,he failed to obtain informed consent from the lady patient.The doctor operated on both eyes at the same time, even though, he should not have operated on the right eye since the lady had corrected vision of 20/30 in that eye and told him she was driving,reading, and doing all her chores as a housewife and mother and she had sufficient vision to do all these things satisfactorily. (App.7,8,217,229,51)

The complaint alleges in the First Cause of Action that the plaintiff,Anna R. Johnson was carelessly treated by the defendant,Dr. Knapp, in 1972 and 1973 at Columbia Presbyterian Hospital and at his offices.(App.635)

The complaint alleges in the Second Cause of Action that the plaintiff,Robert K. Johnson,husband of the plaintiff, has lost the services of his wife and has incurred medical expenses all to his damage.(App.636)

There was no objection made by the defendant doctor to the admission of evidence on the question of informed consent and the defendant doctor's failure to disclose possible dangers in the surgery to the lady's eyes and the case was tried on this evidence and both the plaintiff Johnsons and the defendant doctor produced evidence on this question of the doctor's duty to disclose possible dangers to his patient. (App.236,52,105-114*

The course of the proceedings was a jury trial in New York City,New York, before Hon. William C. Conner,USDJ, from April 26-May 4,1976.The court charged on May 3,1976 as to the issue of informed consent that it was up to the jury to determine what a reasonable opthomologist practicing in the same area as the defendant doctor should have told Mrs. Johnson about the hazards of the eye surgery she was going to undergo.(599,600,608,609,616,620,App.)

*(App. 386-392)

On May 4,1976, after a request from the jury, the court had the charge on this subject of disclosure of hazards to the plaintiff Mrs. Johnson reread to the jury.Following that the Court amplified its charge on this subject by stating to the jury that the defendant Dr. Knapp did not have to disclose "any" of the hazards to Mrs. Johnson, if the jury so found.In other words the Court told the jury that they were at liberty to find that the doctor did not have to disclose"any"of the hazards of bilateral cataract surgery on one hospitalization to Mrs. Johnson before she underwent this surgery.

The jury deliberated for two days, and then returned a verdict in favor of the defendant.This was a special verdict in the form of interrogatories. The jury also returned a note with the verdict indicating they found that the defendant doctor failed to establish a sound patient-doctor realtionship.

The plaintiff made no motions to the court after the verdict but filed the present appeal.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Plaintiff Anna R. Johnson was born on October 17,1932.Her eyesight was good and she never wore glasses.(App. 1-3)

On June 19,1970, she had her first office visit with the defendant doctor, after noticing there was something wrong with her vision.(App.5)

The defendant doctor made an eye examination and told her she had cataracts but did not need glasses nor surgery at that time.He then saw her again on November 18,1970 for a follow-up examination, and on September 15,1971 for a followup examination, and on September 18,1972 for a followup examination.Then on October 24, 1972, he performed an intracapsular cataract extraction with peripheral iridectomy on the left eye.Then during the same hospitalization, on October 31,1972, he performed an intracapsular cataract extraction with peripheral iridectomy on the right eye.(App.6,7,8,9,10)

Prior to operating on the plaintiff's eyes, the only thing he told her about the possible hazards of this surgery was that there was a 90% chance of success or better and did not list any specific hazards, including the possibility of becoming totally blind.(App.8,235,583)

Prior to surgery,Mrs. Johnson had expressed her concern to the doctor about her four very young children, one of whom, the youngest child was a victim of cerebral palsey and had had a great deal of surgery and was in braces.She was worried about being able to take care of them,after the eye surgery.Dr. Knapp merely reassured her and told her she would be driving in a short while after the operations.However, he did not tell her about any of the dangers of these operations on her eyes.(App.8,9)

Mrs. Johnson was admitted to the hospital on October 23,1972, and on the admission notes,signed by Dr. Knapp, there are findings of an examination of September 18,1972, which is only a few weeks prior to her hospitalization.This admission note pertains to the O.D. (meaning right eye) and shows that the uncorrected vision of the O.D. or right eye was reported as 20/60+1 and with a corrective lens, the vision was reported as 20/30-1.This corrected vision is just one (1) line off from the normal vision of 20/20.(App.693)

Mrs. Johnson had told Dr. Knapp that her vision in her right eye was good and the small cataract she had there did not materially affect her vision and was not preventing her from doing all her work in the house, all her shopping, her cooking, her driving the kids to school and other places and attending social gatherings and meetings.

The left eye did have reduced vision both corrected and uncorrected and cataract surgery was indicated in this eye, if the patient desired it, since this was not an emergency,and the lady still had almost perfect corrected vision in her right eye. (App.693,96,95,94)

Still Dr. Knapp did not prescribe glasses for the right eye to correct the vision to 20/30-1, instead her operated on both the right eye and the left eye, and told Mrs. Johnson,"she may as well get it over with".(App. 581,582,583,316)

After he told her there was a better than 90% chance of success, he asked her if she had any questions and that was all he did to obtain her signed consent to this bilateral eye surgery which left her permanently and totally blind on both eyes, and this condition is irreversible. (App.235)

All of Mrs. Johnson's complications and troubles with her good eye,the right eye, began after the cataract surgery performed on this eye by Dr. Knapp.(App.568,569,567)

Following her discharge from the hospital Mrs. Johnson did not progress as Dr. Knapp said she would. Her condition kept deteriorating and Dr. Knapp kept telling her,"it's just one of things".He sent her to a Dr. Coleman for laser beam treatment but it was to no avail.(App. 71,15,18)

Finally, Mr. and Mrs. Johnson went to see a Dr. Marvin Sears at Yale Clinic in New Haven,Conn., later in 1973 and he performed several unsuccessful corneal transplants, one in January,1974, and she was hospitalized at Yale New Haven Hospital on March 11-15 1974, January 10-18,1975 and February 2-28,1975.All attempts by Dr. Sears, who is the head of the Eye Clinic at Yale New Haven, were unsuccessful and she is permanently and irreversibly blind, on both eyes.(App. 28,29)

With reasonable probability, in Dr. Plain's opinion, an opthomologist who qualified and testified as an expert for the plaintiffs Mr. and Mrs. Johnson,Mrs. Johnson's blindness is a direct result of the eye surgery performed by the defendant,Dr. Knapp.(App.96-98,102)

Dr. Plain also enumerated the numerous hazards involved with this type of surgery and he said that Dr. Knapp should have told her about them before operating on her so that she could choose as to whether or not to have the surgery on both eyes.He also felt that there was absolutely no reason to perform cataract surgery on an eye that had 20/30-1 corrected vision such as Mrs. Johnson had.(App.96,105-114)

The greatest hazard associated with this type of surgery is that you might become blind and he felt the doctor is under a duty to disclose this risk to the patient at all times, since this is elective surgery.

All of the doctors who testified for the defendant Dr. Knapp agreed that the condition of Mrs. Johnson's eyes and the resulting permanent blindness came about because of the surgery performed by Dr. Knapp, i.e. the conditions which resulted from the operation performed by Dr. Knapp,including striate keratitis and bullous keratopathy and other conditions which later developed, such as corneal thickening,cystoid macular edema, synechia to the anterior hyaloid face,marked folding of Descemet's membrane,central guttata,diffuse pigmentary disturbance in the macula with a leak,retinal pigment epithelium,blindness. (App. 421,422,378,334,335,333)

If the surgery on the right eye had not been performed the blindness from the above conditions would not have occurred.(App.488,495.496,502-505)

As to the disclosure that Dr. Knapp made to Mrs. Johnson, even Dr. Yannuzzi, an opthomologist who appeared on behalf of the defendant, testified that Dr. Knapp should have told Mrs. Johnson more than he did as far as informed consent.He felt that in Mrs. Johnson's position of being the mother of four young children to bring up and one needing her all the time because of her cerebral palsey condition, Dr. Knapp should have told her more that just saying there was better that 90% chance of success.(App.387,366,480,482)

In his answers to interrogatories put to him by the plaintiff, Dr. Knapp did not say that he ever told Mr. or Mrs. Johnson that she could go blind as a result of this eye surgery.(App.647,300-301)

However, on the witness stand he testified that he did tell them both that she could go blind and this was denied by the plaintiffs.(App.299,582,583)

Dr. Knapp also admitted on the witness stand that after he was sued he altered his office records concerning Mrs. Johnson's ability to see before the eye surgery. (App. 311)

One of the conditions, striate keratitis, indicates inflammation within the eye and is very often a transitory finding for the first few days following cataract surgery, but the greater complication in the right eye was the bullous keratopathy,which is an extremely severe post-operative complication, and this is what led to Mrs. Johnson's corneal surgeries. (App.102,106-109,152,153,669,154-156,172,395)

ARGUMENT

POINT ONE

PLAINTIFFS MADE OUT A CASE OF LACK OF INFORMED CONSENT FOR FAILURE TO DISCLOSE TO A PATIENT UNDERGOING ELECTIVE SURGERY OF THE RISKS INVOLVED, INCLUDING THE RISK OF GOING COMPLETELY AND PERMANENTLY BLIND

The plaintiffs' evidence was undisputed, the defendant Dr. Knapp did not inform Mrs. Johnson or her husband, Mr. Robert K. Johnson, of the risks involved in the eye surgery for bilateral cataracts which he performed on Mrs. Johnson.(App. 293,294,298)

In the written answers to interrogatories submitted by the defendant, Dr. Knapp, he stated exactly what disclosures he made to the patient Mrs. Johnson and her husband, and the only disclosure Dr. Knapp made was that there was better than a 90% chance of success.The plaintiffs submit that this is not compliance with the requirements of the standard of disclosure of risks to a patient undergoing surgery on both eyes at the same hospitalization.(App.647,300-301)

The defendant Dr. Knapp completely failed to provide the patient,Mrs. Johnson, with the information which was material to her,which information was necessary in order for her to decide whether to undergo the proposed surgery or not, and plaintiffs' claim the verdict of the jury, in the interest of justice and public welfare was against the evidence and should be reversed.(App.387,480,482,293,294-298)

In the case at bar, the defendant Dr. Knapp produced three doctors, all opthomologists,practicing in the same area, who testified that in their opinion, Dr. Knapp had made a sufficient disclosure to Mrs. Johnson but Dr. Plain who testified for the plaintiffs said in his opinion Dr. Knapp had not made a sufficient disclosure to Mrs. Johnson, even within the standards of the good medical practice in the area. (App. 105-110,113,114)

However, even one of defendant's doctors, a Dr. Yannuzzi, said he would have told Mrs. Johnson and her husband more about the risks involved in this type of surgery, thus qualifying his opinion which was given on his direct testimony.(App.387,389,392)

The plaintiffs claim that the physician has long borne a duty,on pain of liability for unauthorized treatment, to make adequate disclosure to the patient. A patient should be denied the opportunity to weigh the risks of surgery or other therapy,only, where it is evident he cannot evaluate data,as for example, where there is emergency or the patient is a child,or incompetent.None of these conditions existed in the case of Mrs. Johnson and she was entitled to the disclosure of the risks involved by the defendant doctor.Since the doctor failed to disclose the risks and she was injured the doctor is liable and the verdict by the jury should be reversed, since there was clearly a miscarriage of justice.

Cobbs v. Grant,104 Cal. Rptr. 505 (Oct. 1972)

"* * * We hold that the standard measuring performance of that duty by physicians, as by others, is conduct which is reasonable under the circumstances."

The court in the Garone v. Roberts' Tech. & Trade Sch., infra, further went on to say on page 134,"In our own state the question was considered in Fogal v. Genessee Hospital, 41 A.D.2d 468,473, 344 N.Y.S. 2d 552,559, and the Court concluded as follows:-"* * * In Canterbury, the court held that the duty and scope of disclosure arise apart from medical considerations and are not governed by the profession's standards of due care but by the general standard of conduct reasonable under the circumstances.This general standard recognizes the patient's prerogative to decide on the projected treatment whereas a medical standard is largely self-serving.We consider the Canterbury rule preferable and hold that a doctor is obliged to divulge to his patient the risks which singly or in combination, tested by general considerations of reasonable disclosure under all the circumstances, will materially affect the patient's decision whether to proceed with the treatment."

In the case of Canterbury v. Spence, infra, it was held on this point that the physician's duty to inform the patient is not dependent upon the patient's request for disclosure, and the patient's cause of action against the physician for failure to adequately inform the patient is not dependent upon existence and nonperformance of relevant professional tradition. The respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.

In the New York case of Garone v. Roberts' Tech. & Trade Sch. 366 N.Y.S. 2d 129, the court upheld the ruling on this point in Canterbury v. Spence, supra, and adopted the same law, and then went on to say on page 133-

"* * * The majority of the courts dealing with the problem have made the duty depend on whether it was the custom of physicians practicing in the community to make the particular disclosure to the patient.* * * We do not agree that the patient's cause of action is dependent upon the existence and non-performance of a relevant professional tradition."

It was undisputed that the plaintiff,Mrs. Johnson was totally blind on both eyes and that this condition is irreversible.It was also undisputed that this condition was a complication of the bilateral cataract surgery performed on her by Dr. Knapp, and this was even admitted by Dr. Knapp himself.(App.319,409,410,415,416,421,422)

There was proof both from the plaintiffs' doctors, Dr. Plain and Dr. Sears, that the medical profession recognized the possibility of these undesirable complications after eye surgery for cataracts, and the defendant's doctors, Dr. Coleman, Dr. Iannuzzi,Dr. Rizzutti, and Dr. Knapp himself.(App. 422,337,334,335,503,572,571,568,567)

The plaintiff Mrs. Johnson and her husband claim that under the facts and circumstances disclosed by the record and the evidence,including the fact that no immedate emergency existed, the defendant doctor was obligated to make a reasonable disclosure to his patient of the known dangers which were incident to or possible in the proposed eye surgery.

DiRosse v. Wein 261 N.Y.S. 2d 623

In the leading case of Canterbury v. Spence 464 F.2d 772 (1972), the court held that it is the prerogative of the patient, to determine for himself the direction in which his interests seem to lie, and to enable a patient

to chart his course understandably, some familiarity with therapeutic alternatives and their hazards become essential.

The court held that the physician has a duty as a facet of due care, to warn of dangers lurking in the proposed treatment and to impart the information which the patient has every right to expect; reasonable explanation required means generally informing the patient in nontechnical terms as to what is at stake, i.e., the therapy alternatives open to him, goals expected or believed to be achieved, and risks which may ensue from the particular treatment and no treatment.

Dr. Knapp failed completely to inform Mrs. Johnson of the risks involved in this eye surgery, and he also failed to inform her in nontechnical terms that she could become blind. Mrs. Johnson testified that she never knew that she could become blind from this surgery and the doctor never told her this. (App. 581,582,583)

Mrs. Johnson said that the doctor asked her if she had any questions about the surgery and she and her husband, being lay persons, with no knowledge of opthomology replied in the negative. This is not compliance by the doctor with the law of informed consent. (App. 183,184,17,8,293,294,295,300,301,184)

Mrs. Johnson and her husband testified that at no time did the doctor inform them of any risks at all before he obtained the written consent for Mrs. Johnson to undergo this bilateral surgery on her eyes.(App. 184)

The appellants, Mr. and Mrs. Johnson,contend that because of the failure of the doctor to obtain the informed consent of Mrs. Johnson, the written consent he obtained was of no effect, since it was not an informed consent as required by the law.

The doctor testified that no emergency existed, in fact the vision in Mrs.Johnsons' right eye was 20/60 corrected to 20/30-1 by glasses, which was almost normal vision, and Mrs. Johnson testified that she was doing everything she wanted and needed to do such as driving, cooking,cleaning,reading,etc., and she never wore glasses and Dr. Knapp never prescribed any glasses for her.(App.9,7)

There is no dispute as to the evidence presented by both the plaintiffs and the defendant and his other expert witnesses, that this was elective surgery.

Under the facts as proved at the trial,the proof is undeniably that no immediate emergency existed, and therefore, the defendant doctor was obligated to make reasonable disclosure to the patient,Mrs. Johnson, of the dangers incident to or possible in the proposed bilateral cataract surgery, including the danger of going completely and permanently blind on both eyes.

In the case of Small v. Gifford Hospital,349 A. 2d 703(June Term,1975,Vt.) it was held, citing,Canterbury v. Spence,supra, that the standard of disclosure of risks to a patient undergoing surgery is measured not by the prevailing medical practice in the community but rather by the information material to a patient necessary to reasonably decide whether to undergo proposed treatment or surgery.

Thus when we talk about risks,we must always ask ourselves, did Mrs. Johnson have the opportunity to decide whether the benefits derived from the eye surgery to be performed by Dr. Knapp was worth the risk of going totally and permanently blind.

From the evidence and the record we must answer this question "No".

POINT TWO

THE DOCTOR'S DUTY TO INFORM THE PATIENT IS MEASURED BY THE RIGHT OF A REASONABLE PATIENT TO BE INFORMED OF THE ATTENDANT RISKS IN ORDER TO DECIDE WHETHER OR NOT TO UNDERGO THE TREATMENT OR SURGERY.

The older rule is no longer the law in the State of New York and many other jurisdictions, concerning the doctor's duty to inform the patient of attendant risks.This older rule held that the doctor's duty to inform is akin to his standard of competence,that is, measured by the medical standards and customs in the community. The new rule adopted in the Canterbury v. Spence case and Garone v. Roberts' Tech. & Trade School, and DiRosse v. Wein,and Fogal v. Genessee Hospital, supra, all New York cases,is that the duty is measured by the right of a reasonable patient to be informed of the attendant risks in order to decide whether or not to undergo the treatment.

Where, as in the case at bar, the surgery is elective, the right of informed choice is of more significance.

Small v. Gifford Memorial Hospital, 349 A.2d 703

Under the old rule, it allowed the medical profession to set its own standards for informing patients.

Under the new rule, adopted by New York, it is the duty of the physician, in terms of informed consent,to give to a patient whose situation otherwise permits it all information material to the decision to undergo the proposed treatment.

This is particularly true in cases of elective surgery, such as we have here.The burden would be on the patient to show, as was done in this case, that such material information was not furnished.

The only adequate defense the physician should be permitted to show which existed for the non-disclosure was that justifiable grounds existed for non-disclosure, such as youth or incompetency of the patient, the emergency nature of the situation, or the fact that the risk was literally unknown to the profession at the time.

None of these justifiable grounds existed for non-disclosure in our case, therefor, Dr. Knapp was under a duty to disclose the risks to Mrs. Johnson under this legal standard in New York, but he failed to do so.

In the case of Garone v. Roberts Tech, & Trade Sch., supra, (N.Y. 1975),the physician was held responsible in damages for his failure to obtain an informed consent for an operation for removal of a foreign object from the patient's eye.

The patient lost his sight in that eye. The plaintiff's mother testified that the doctor told her that the plaintiff needed an operation for the removal of the foreign body.He also stated that he performed this operation many times and that the boy would be a new boy after it.He said ncthing to her as to any danger in the operation or that he could lose the sight of the eye as a risk of the same.The plaintiff's father testified that he was never told by the doctor or anyone else that there was a possibility that the boy could lose the sight of the eye as a risk of said surgery, but the doctor told him he would be a new man after the operation.

It was held that the doctor failed to obtain an informed consent, and the court said that liability of a physician for injuries suffered is ordinarily based on the failure of the physician to exercise the required skill and care under the prevailing circumstances and in the particular situation, but the physician may be held answerable where he fails to inform the patient of the risks of a particular treatment so that the latter can decide whether he is willing to undergo the treatment.

It is not enough for a physician merely to obtain consent before proceeding with treatment.He must obtain informed consent-that is,he'sunder an affirmative duty

to make a reasonable disclosure to his patient of the known dangers which are incident to or possible in the proposed treatment;if he fails in that duty, he can be held liable for malpractice, even where the treatment is properly performed if it injures the patient.Garone v. Roberts'Tech. & Trade Sch.,supra, 45 N.Y. Jur., Physicians and Surgeons Section 161,p. 423.

The same facts of non-disclosure appear in Mrs. Johnson's case, she was never told she might go blind, and after the surgery she did, and Dr. Knapp failed to obtain her informed consent for this elective surgery and he is liable for her injuries and blindness under this rule of law.

The doctor's responsibility stems from his failure to obtain an informed consent from the plaintiff, Mrs. Johnson.Since the court said in the Garone case, where one has been given insufficient information upon which to formulate an intelligent consent and gives his consent it is an uninformed or invalid consent and is tantamount to no consent at all.

In Cobbs v. Grant, supra, the court stated that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases,courts may safely assume the knowledge of patient and physician are not in parity.

Secondly, a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. Thirdly, the patient's consent to treatment, to be effective, must be an informed consent. And fourthly, a patient being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms length transactions.

From the foregoing axiomatic ingredients emerges a necessity, and a resultant requirement, for divulgence by the physician to his patient of <u>all</u> information relevant to a meaningful decisional process. But it is the prerogative of the patient, <u>not</u> the physician, to determine for himself the direction in which he believes his interests lie. To enable the patient to chart his course knowledgeably, reasonable familiarity with the therapeutic alternatives and their hazards become essential. Mrs. Johnson testified that she trusted and relied on Dr. Knapp's knowledge, but he failed to inform her as required by law.

The test is not what the other reasonable opthomologists would have told Mrs. Johnson before obtaining her consent to operate on her, but the test is rather,"* * * what would a prudent person in the patient's position have decided if adequately informed of all significant perils." Canterbury v. Spence, supra.

Medical doctors are not invested with discretion to withhold information from their patients. Even though patient was upset,agitated,depressed, crying, and had marital problems and had been drinking, the court said that since no emergenry existed and he was legally competent he should have been advised of the risks of shock therapy.Mitchell v. Robinson,334 S.W.2d 11(1960) cited in Cobbs v.Grant, supra.Scaria v. St. Paul Fire & Marine Ins. Co.,227 N.W. 2d 647 (Wis. 1974) Zeleznik v. Jewish Chronic Disease Hospital 366 N.Y.S. 2d 163, (1975)

In the Zeleznik v. Jewish Chronic Disease Hospital case, our New York courts said in 1975, the duty to disclose risks of medical procedures is based on patient's right to determine what should be done with his body and such right should not be at the disposal of the medical community.A physician has the obligation to make reasonable disclosure of available choices and potential dangers before performing a medical procedure.

Whether a physician's disclosure of risks of medical procedure has been reasonable is for the jury to decide and, in determining such issue the jury is not bound by conclusions of medical community.

The New York Court also held that in the medical malpractice action in the Zeleznik case, supra, that it was not necessary, and it would have been improper, for the patient to have offered his expert's personal opinion of medical community's standard as to risks which physician should have disclosed before obtaining patient's consent to undergo angiogram procedure.

In our case, Mrs. Johnson's expert cited numerous hazards which should have been disclosed to her before obtaining her consent for the eye operation. The defendant Dr. Knapp's experts gave their opinions as to what the community standard was as to disclosure of risks in this type of surgery and the court held the plaintiff's case to the disclosure rule as laid down by the medical community, and this was clearly error, confused the jury, and resulted in a miscarriage of justice by a defendant's verdict for the doctor, and by the jury's own note attached to the verdict, they have unequivocally shown that they felt the doctor did not disclose the risks to Mrs. Johnson, but in being required to answer the 1st. interrogatory as they were , the verdict was in favor of the defendant doctor, and should be reversed.

In ATLA Law Journal Vol.35, p. 64-76, the article discusses all the leading cases in New York and elsewhere, the Canterbury,Wilkinson and Cobbs,cases.As to Informed Consent, the doctor is under an affirmative duty to disclose to the patient the risks involved in contemplated surgery or treatment, and expert evidence of local professional practice to make such disclosure is not needed.The individual patient's right is to make an informed choice and it should not be delegated,abdicated, or arrogated to the medical profession.

The court in our case at bar delegated, abdicated, and arrogated to the medical profession and Dr. Knapp, the duty as to what Dr. Knapp should have told Mrs. Johnson about the risks attendant on her eye surgery. The court bound the jury by the standard of informed consent set down by the medical community, not by what Mrs. Johnson reasonably should have been told.This was clearly error.(App. 609,600,616,620)

The thrust of the informed consent doctrine is that if the patient suffers a bad result from treatment, he may have a remedy on this account if the doctor should have advised him of the risk of this adverse result and failed to do so, even though the patient is unable to show the doctor's negligence or substandard practice in treatment.

Although Mrs. Johnson tried and failed to show to the satisfaction of the jury the doctor's negligence or

substandard practice, she did show without any doubt, that Dr. Knapp failed to inform her of the risk of going blind after the surgery and other risks.

By the evidence and the proof of the failure to obtain informed consent,Mrs. Johnson was entitled to a proper instruction on informed consent and to a verdict from the jury.

In Mrs. Johnson's case, Dr. Knapp, from the evidence presented was guilty of the negligent failure to disclose serious collateral risks in the proposed eye. surgery.

In the Canterbury case, supra,the 19 year old patient submitted to a laminectomy, and he did not probe into the exact nature of the operation by questions to the doctor, and when his mother asked if this was a serious operation, the doctor merely replied,"Not any more than any other operation." The mother signed the consent form and the boy was operated on and became paralyzed.

The case held the three main elements of a valid patient consent to be, and they are so in New York,(1) A physician must disclose the material risks of a treatment whether a patient asks or not.

From page 71,"We discard the thought that the patient should ask for information before the physician is required to disclose.Caveat emptor is not the norm for the consumer of medical services.Duty to disclose is more than a call to

answer the patient's questions, it is a duty to volunteer, if necessary, the patient needs for intelligent decision.The patient may be ignorant,confused, overawed by the physician or frightened by the hospital, or even ashamed to inquire."

(2) The law, not prevailing local medical practice, governs what risks must be disclosed.From page 72,"To bind the disclosure obligation to medical usage is to arrogate the decision on revelation to the physician alone.Respect for the patient's right of self determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves. Neither the source nor the scope of the physician's duty to disclose rests in medical custom but in the law, measured by the patient's needs.* * * All risks potentially affecting the patient's decision must be unmasked.And to safeguard the patient's interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure."

In general the patient must be told the alternative risks of submitting to treatment and of remaining untreated and of the options,varieties,and hazards of alternative treatments.

Mrs. Johnson was told none of these things by Dr. Knapp,he even stated in his answers to interrogatories that he did not go into the specfics of failure for the operations which resulted in failure.(App.647)

(3) The doctor's disclosure of risks cannot be avoided simply because it might have scared the patient into balking or refusing surgery.The physician's privilege to withhold information for therapeutic reasons must be carefully circumscribed for otherwise it might devour the disclosure rule itself.There was neither a medical emergency nor any evidence that the patient's emotional makeup was such that concealment of the risk of paralysis was medically sound."

As in our case,Mrs. Johnson should have been told she could go blind or other serious things could go wrong with her eyes from this surgery, and there was no medical emergency nor any evidence that the patient's emotional makeup was such that concealment of going blind was medically sound.In fact Dr. Knapp testified that he didn't even advise the surgery, but why he didn't advise it he did not say.(App. 322,325)

This was contradicted by Mrs. Johnson, and it is inconceivable that a doctor would perform such delicate eye surgery on both eyes at the same hospitalization of a young woman with four young children, if he did not advise it.(App.581,582)

In the ATLA Law Journal Vol.35 at page 75 on Tort Law, they quoted Wilkinson v. Harrington , 243 A. 2d 745 (R.I. 1968) and this case joins hands with Canterbury v. Spence,supra, which has been adopted in New York, as previously cited,"The patient's right to make up his mind should not be delegated to a local medical group-many of whom have no idea as to his informational needs.The doctor-patient relationship is a one-on-one affair....It is our belief that, in due deference to the patient's right to self-determination, a physician is bound to disclose all known material risks peculiar to the proposed procedure.It is surely true that the more communication between doctor and patient, the less litigation between them."

The note returned by the jury critizing the failure of the defendant Dr. Knapp to set up a proper patient-doctor relationship told just that.In effect they found there was no informed consent given by Mrs. Johnson and it was Dr. Knapp's fault for failure to make a proper disclosure.(App. 665)

79 ALR 2d 1028,Malpractice
52 ALR 3d 1084,Informed Consent-Expert Testimony

POINT THREE

ALTHOUGH NO SPECIFIC EXCEPTION WAS TAKEN TO THE CHARGE, THE VERDICT SHOULD BE REVERSED IN THE INTERESTS OF JUSTICE,SINCE THIS CAUSE OF ACTION WAS SUBMITTED TO THE JURY ON A FUNDAMENTALLY ERRONEOUS THEORY

The court charged the jury on the doctrine of informed consent to the effect that medical community standard controls as to the risks of which the patient is to be informed.(App.600,616,620)

The jury after much deliberation asked to have that portion of the charge reread, and after it was reread, the court further charged on the doctrine of informed consent, and told the jury that it was up to them to determine what a reasonable opthomologist practicing in the same community would have divulged or not divulged to Mrs. Johnson about the risks inherent in her contemplated eye surgery.(App. 620)

The court even went so far as to tell them they could find that the doctor would not have to inform Mrs. Johnson of "any" of the hazards and risks involved.(App. 620)

This was clearly reversible error, even though no objection was taken to this part of the charge.This was plain error committed by the court. Since instructions are the fundamental basic charges, the appellate court herein may notice and correct serious error,plainly prejudicial to the appellant, even though not called to such court's attention and despite the absence of objection to the instruction

in the court below, in order to prevent a miscarriage of justice.See Basko v. Sterling Drug, Inc., 416 F. 2d 417 (2d Cir.)

In the Basko case, this very court reversed a jury verdict against the plaintiff, who became blind from the ingestion of a product known as Aralen.Although the plaintiff's counsel make voluminous requests to charge, he did not make a request to charge that a manufacturer may in some circumstances have a duty to warn "those few persons who it knows cannot apply its products without serious injury."

But the lower court did charge that the manufacturer could be absolved from the imposition of liability in tort because an "appreciable number of users" would not be adversely affected." Although no objection was taken to this charge and to the court's repeated references to "appreciable number of users", this court found plain error and reversed the defendant's verdict and ordered a new trial to prevent a miscarriage of justice.

The appellants, Mr. and Mrs. Johnson contend that the charge as given by the court below was improper and requires reversal.In the case of Zeleznik v. Jewish Chronic Disease Hospital,supra, the court held, in New York, that since the cause of action was submitted to the jury on a fundamentally erroneous theory,although no exception was taken to the

charge, in the interests of justice, the verdict was reversed.

The erroneous theory under which this case went to the jury was that the court charged that the medical community standard controls as to the risks of which the patient is to be informed.

The New York court held that that was not the law of the state of New York, and held that the jury should not be bound by the conclusions of the medical community.The correct theory, the court said was the "reasonable man" theory or the "objective"test as enunciated in Canterbury,supra.

So in the case of Mrs. Johnson, the correct charge would have been and should have been the"reasonable man" or "objective" test as enunciated in Canterbury,supra.

In the case of Feldmann v. Connecticut Mut. Life Ins. Co. of Hartford,Conn., 142 Fed.Rep.,2 Series, the Circuit Court of Appeals in the Eight Circuit, held that omission of an instruction for which there was no specific request is ordinarily not reversible error,but the giving of a mere general instruction which leaves open the right to apply an incorrect legal theory emphasized in the evidence may warrant a reversal where it appears the jury was confused and not competently able to determine the proper principle to be applied.

The court further stated on page 631, that from all the evidence and the proceedings generally, they were unable to escape the conviction that the jury was led to believe that the view of the medical experts was controlling upon it.

In the appellants'case, the jury was also mislead by the court's charge and felt it was bound by the medical experts testimony and the judge's charge that the community standard of disclosure was the law that bound them.They showed this by the note which they returned with their verdict.(App. 665)

The same facts exist in the appellants' as in the Canterbury case, supra,i.e., the plaintiffs made out a prima facie case of violation of the physician's duty to disclose which Dr. Knapp's explanation did not negate and the instruction as given to the jury by the court on the question of informed consent was given to them on the wrong theory and resulted in a verdict for the defendant doctor and a miscarriage of justice.

In his charge the judge limited the responsibility of the defendant Dr. Knapp to the prevailing medical practice in the community, and this led the jury to improperly find for the defendant on this critical issue.

This verdict must be reversed on the grounds that the charge of informed consent as given is not supported as the appropriate law for this jurisdiction.

The instruction limiting the defendant Dr. Knapp's duty to disclose to those disclosures which physicians and surgeons of good standing would make under same or similar circumstnces, having due care to the patient's physical, mental and emotional condition was erroneous. The duty to disclose and inform cannot be summarily limited to professional standards that may be nonexistent or inadequate to meet informational needs of the patient. Scaria v. St. Paul Fire & Marine Ins. Co. SUPRA.

In the Scaria case, the court also found that in a medical malpractice action alleging negligence in care and treatment and failure to adequately inform patient of risks, submission of a single instruction on negligence treating two duties separately was not erroneous; however, because standards by which duties should be measured were somewhat different, question should have been stated separately.

In our case at bar, although failure to adequately inform the plaintiff was not pleaded in the complaint, it was litigated by both the plaintiffs and the defendant at the trial, and no objection to admission of evidence on the question of Dr. Knapp's failure to disclose possible dangers in the surgery were made by the defendant, therefore, under the rule of DiRosse v. Wein, supra, and Garone v. Roberts' Tech. & Trade Sch., supra, since the issue was raised at the trial, and was tried, the pleadings are

deemed amended to conform to the proof.

The court should have submitted a question to the jury and asked them whether or not they found that Dr. Knapp disclosed as required the risks involved in the surgery to Mrs. Johnson and whether or not he had obtained informed consent to operate.

The question submitted to the jury did not permit them to answer on the question of informed consent and proper disclosure and thereby resulted in making them bring in a verdict for the defendant under an erroneous theory of law.The only question the jury was allowed to answer was "Did Dr. Knapp fail to use the skill and care of an ordinary opthomologist at the time and place in question?" (App.664)

Since this case was tried on the theory of lack of informed consent, this question alone should not have been allowed to preclude the jury from bringing in a verdict for the plaintiffs if they found no informed consent, since it was stated in Garone v.Roberts Tech. & Trade School Sch.,supra, at page 135,that a case based on lack of informed consent,does not depend in any way on whether the procedure followed by the doctor is proper or improper,* * * there need be no showing of negligence or malice and the plaintiff is entitled to damages which flow from the unauthorized procedure regardless of the fact that the operation was performed with the utmost care.The damages related to the cause

of action for uninformed consent arises not because the procedure was performed unsatisfactorily, but because it was performed at all.

And further as held in Cobbs v. Grant, supra, Where there is complicated procedure, a jury in a malpractice action against a surgeon should be instructed that when given procedure inherently involves known risk of death or serious bodily harm, a medical doctor has the duty to disclose to the patient the potential of death or serious harm, and to explain in lay terms the complications which may possibly occur; and the doctor, must also reveal such additional information as skilled practitioner of good standing would provide under similar circumstances.

In Mrs. Johnson's case the court did not adequately instruct the jury or set forth the nature of a medical doctor's duty to obtain the informed consent of a patient before undertaking the treatment or surgery.

The action based on lack of informed consent is one for negligence in failing to conform to the proper standard. If the doctor fails to meet his due care duty to disclose pertinent information, the action should be pleaded in negligence. Cobbs v. Grant, supra.

CONCLUSION

The plaintiffs proved their right to recovery on one or more theories, negligence and the lack of informed consent.

The trial judge restricted her to one theory, the failure to use skill and care of an ordinary opthomologist, by his erroneous charge on disclosure, and his 1st. interrogatory to the jury which controlled the verdict.

A miscarriage of justice resulted from the plain error in the judge's instructions on informed consent.

This Court of Appeals has the power to, and now should, order the verdict for the defendant doctor set aside and remand for a new trial.

Dated:
August 27,1976

Respectfully submitted

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANNA R. JOHNSON and ROBERT K. JOHNSON	)	
Plaintiffs-Appellants	)	
	)	
-against-	)	CIVIL NO. 76-7249
	)	
PHILLIP KNAPP	)	
Defendant-Appellee	)	

PROOF OF SERVICE

This is to certify that two copies of Plaintiffs-Appellants' Brief and two copies of the Joint-Appendix were served by hand on Attorney Arthur N. Seiff, attorney for the Defendant-Appellee, on September 3, 1976.

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